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No. 06-562

In the Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

ATLANTIC RESEARCH CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF *AMICUS CURIAE* OF COOPER INDUSTRIES, LLC, MEADWESTVACO CORPORATION AND UGI UTILITIES, INC. IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICI CURIAE* [1]

Amici are currently involved in significant CERCLA litigation. That litigation, in conjunction with decades of participation in CERCLA's remedial scheme, has allowed *amici* to develop a unique and robust understanding of CERCLA's application and the practical implications of this Court's impending decision.

Cooper Industries, LLC ("Cooper") is a leading manufacturer of electrical products, tools and hardware headquartered in Houston, Texas. As the successful petitioner in *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157 (2004) – the remanded case that focused national attention on the issue presented here – Cooper has been at the center of the evolving debate regarding private-party CERCLA claims. In that case, the Court held that CERCLA § 113(f)(1), 42 U.S.C. § 9613(f)(1), "authorizes contribution claims only 'during or following' a civil action under § 106 or § 107(a)," 543 U.S. at 168, and remanded for consideration of the "question whether Aviall has waived [its right to a § 107] claim and the underlying § 107 question (if it is not waived)," *id.* at 169.

Since that decision, Aviall amended its complaint to assert § 107 theories that were dismissed in an August 8, 2006 opinion by Judge Fitzwater of the United States District Court for Northern District of Texas.[2] That matter is now

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[1] By letters filed with the Clerk of the Court, Petitioner and Respondent have consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, *amici curiae* state that the brief was prepared in its entirety by *amici curiae* and their counsel. No monetary contribution toward the preparation or submission of this brief was made by any person other than *amici curiae* and their counsel.

[2] *Aviall Servs., Inc. v. Cooper Indus., Inc.*, 63 E.R.C. 1623 (N.D. Tex. 2006). Because Judge Fitzwater's decision presents an exceptionally clear and compelling analysis of the issue before this Court, a copy of that opinion is set forth in the attached appendix to this brief. App. 1a.

pending before the United States Court of Appeals for the Fifth Circuit and will be directly affected by the decision in this case.

UGI Utilities, Inc. ("UGI") is a natural gas and electric utility headquartered in Reading, Pennsylvania. UGI's alleged predecessors owned stock in numerous companies that in turn owned or operated manufactured gas plants in the late 1800's and early 1900's prior to the passage of the Public Utility Holding Company Act, under which virtually all such interests were required to be divested. Thus, UGI's interests as *amicus* arise both as a corporation that has been sued and which has been largely victorious under CERCLA (*see* n.4, *infra*) and as the petitioner for a writ of certiorari to the United States Court of Appeals for the Second Circuit on virtually the same § 107 question as is presented here.[3]

In the Second Circuit case, UGI was sued by Consolidated Edison Company of New York, Inc. ("Con Ed") under CERCLA and state law over the cleanup of sites that allegedly were contaminated by operations at coal gas plants from 1887 to 1904. Con Ed claimed that UGI and its predecessors were past owners and operators of the plants and therefore liable under CERCLA. After suing UGI, Con Ed entered into a Voluntary Cleanup Agreement with the State of New York to clean up the sites.

The Second Circuit affirmed dismissal of a number of Con Ed's claims against UGI on grounds that the past owners or operators involved were corporations distinct from UGI.[4]

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[3] *UGI Utils., Inc. v. Consol. Edison Co., petition for cert. filed*, No. 05-1323 (filed Apr. 14, 2006). The government asked the Court to hold consideration of UGI's petition pending resolution of this case. Brief for the United States as *Amicus Curiae*, No. 05-1323, at 2.

[4] *Consol. Edison Co. v. UGI Utils., Inc.*, 153 Fed. Appx. 749 (2d Cir. 2005); *see also Atlanta Gas Light & Gas Co. v. UGI Utils., Inc.*, 463 F.3d 1201 (11th Cir. 2006) (affirming summary judgment for UGI on operator liability claims).

The Second Circuit also affirmed dismissal of Con Ed's contribution claim against UGI under § 113(f)(3)(B), because the Voluntary Cleanup Agreement was not an agreement that "resolved its liability to the United States or a State," which is a prerequisite to such a claim. *Consol. Edison Co. v. UGI Utils., Inc.*, 423 F.3d 90, 97 (2d Cir. 2005). However, with respect to one operator liability claim, the Second Circuit reversed and allowed Con Ed to pursue a § 107 claim for joint and several liability against UGI, holding that, especially in the wake of *Cooper Industries*, a party that has not yet been sued or made to participate in an administrative proceeding is allowed to use § 107 to recover cleanup costs incurred voluntarily. 423 F.3d at 102. UGI's petition for a writ of certiorari to review that holding is pending.

Finally, *amicus* MeadWestvaco Corporation ("MeadWestvaco") is a global packaging company with worldwide operations that is headquartered in Glen Allen, Virginia. MeadWestvaco has extensive CERCLA experience at sites nationwide including a sixteen-year-old matter currently pending before the Third Circuit for the third time. *See Beazer East, Inc. v. Mead Corp.*, 412 F.3d 429 (3d Cir. 2005). MeadWestvaco also is involved in another complex CERCLA proceeding in which plaintiffs are attempting to override a federal grant of contribution protection under CERCLA § 113(f)(2) using the § 107 claim theories at issue in this case.

SUMMARY OF THE ARGUMENT

CERCLA fully serves its intended purpose without the expanded private-party claim theories advanced below. CERCLA's available remedies do not need augmentation with new § 107 cost recovery or contribution rights for liable parties. The "intent" and the "policy" advanced by those who advocate a more expansive reading of CERCLA are served by the statute as it stands.

Expanding § 107 claims to provide liable parties with remedies that are not grounded in the text and structure of

CERCLA will bring unintended and unnecessary complications that will undermine CERCLA's cleanup incentives and divert parties' and courts' resources from cleanup to litigation. As it stands, CERCLA envisions – and delivers – government supervised cleanup, while also ensuring that the considerable power of CERCLA will rarely be brought to bear on private parties like *amici* without underlying government involvement.

At the time this Court issued its decision in *Cooper Industries*, all courts of appeals to consider the issue had held "that a private party that is itself a PRP may not pursue a § 107(a) action against other PRPs for joint and several liability." *Id.*, 543 U.S. at 169 (citations omitted). Yet, even though "covered parties" listed under CERCLA § 107(a)(1)-(4) (i.e., "PRPs") were barred from bringing § 107 claims, provisions including the contribution mechanisms available under § 113(f) made CERCLA "a comprehensive statute that grants the President broad power to command government agencies and private parties to clean up hazardous waste sites," while "those actually responsible for any damage, environmental harm, or injury from chemical poisons may be tagged with the cost of their actions." *United States v. Bestfoods*, 524 U.S. 51, 55 (1998) (citations and bracketing omitted). *See also Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 483 (1996) ("the two main purposes of CERCLA are prompt cleanup of hazardous waste sites and imposition of all cleanup costs on the responsible party") (citations and quotation marks omitted).

There is no need, however, to create a new § 107 remedy in order to advance those aims. CERCLA provides ample incentives and tools for private parties to carry out beneficial government-supervised cleanups, without reading in a new remedy not found in the text. Indeed, the § 107 remedy envisioned by the court of appeals would actually work as a disincentive to private cleanup in many circumstances and would certainly discourage cooperation and settlement with EPA.

Undoubtedly, *Cooper Industries* surprised some PRPs when the Court insisted, logically, that the plain language of § 113(f) be applied to determine when a contribution remedy is available. The plaintiff PRP in this action, which had remediated a site and expected to sue other PRPs for contribution – but had not carefully observed the prerequisites for a contribution claim – found that after *Cooper Industries* it was "foreclosed from using § 113. This path is barred because Atlantic [Research] – like Aviall – commenced suit before, rather than 'during or following,' a CERCLA enforcement action." *Atl. Research Corp. v. United States*, 459 F.3d 827, 835 (8th Cir. 2006) (quoting. § 113(f)(1)). The plaintiff in the Second Circuit case still before this Court on a petition for certiorari faced similar barriers. *Consol. Edison*, 423 F.3d at 97 (plaintiff PRP had failed to satisfy prerequisites for a contribution claim under § 113(f)(3)(B)).

But individual PRPs' difficulties in perfecting their contribution claims after *Cooper Industries* do not justify creating a new remedy – especially given the consequences of that new remedy. One such consequence is already apparent: in creating their new cause of action under § 107, the Second and Eighth Circuits fashioned a new category of "voluntary" PRPs that is nowhere anticipated in CERCLA's text. If endorsed by this Court, that judicial alteration will bring new layers of factual issues into already complex and burdensome CERCLA litigation.

By upsetting the carefully crafted contribution provisions of § 113(f), the court of appeals' new § 107 PRP remedy will impair the government's interests and those of private parties, will result in additional inefficient litigation, and will increase, not reduce, uncertainty regarding when cost recovery is available. Properly read, CERCLA does not provide this remedy, and the remedies it does provide sufficiently serve the statutory goals of remediation and responsibility.

ARGUMENT

I. CERCLA § 107(a) DOES NOT CREATE ANY RIGHT FOR LIABLE PARTIES TO INDEPENDENTLY PURSUE PRIVATE CLAIMS.

A. PRPs Are Specifically Excluded From Pursuing Direct Cost-Recovery Claims Under § 107(a)(4)(B).

Section 107(a) establishes four categories of responsible parties and then provides that they shall be liable for certain government costs and "any other necessary costs of response incurred by any other person...." The plain meaning of this text is apparent through its double use of the word "other." The first instance of "other" refers to the type of costs at issue and distinguishes them from costs incurred by the government and recoverable under § 107(a)(4)(A).

What then of the second "other"? Under the Eighth Circuit's reading – that PRPs may assert § 107 cost recovery claims – that second "other" would be rendered superfluous and would merely duplicate the same distinction that the first already accomplished. In contrast, the United States' reading properly gives life to both "others" by confirming that the sentence refers to those "other" than the covered "persons" (i.e., PRPs) described in § 107(a)(1)-(4) above. Read properly, § 107(a)(4)(B) establishes liability for costs "other" than governmental costs by persons "other" than PRPs.

B. The Evolution of CERCLA § 107(a)(4)(B) Directly Supports That Section's Plain Language.

The evolution of § 107(a)(4)(B) confirms that exact textual meaning. The House of Representatives and the Senate initially offered very different solutions to the environmental concerns that CERCLA addresses. The House authored H.R. 7020, 96th Cong. (Sept. 23, 1980), which

would only have permitted suit by "[t]he Administrator, or any other such governmental entity to which a person is liable under this section for the recovery of costs...." *Id.* at § 3071. In contrast, the Senate Environmental and Public Works and Finance committees reported S. 1480, 96th Cong. (Nov. 18, 1980). That bill contained dramatically broader liability provisions including the predecessor to CERCLA § 107(a)(4)(B). Among other things, it would have permitted private parties to recover "all damages for economic loss or loss due to personal injury or loss of natural resources resulting from such a discharge, release, or disposal...." *Id.* at § 4(a)(iv)(2).

There was substantial controversy over the breadth of the liability provisions in these conflicting bills. For example, the "Stafford-Randolph Superfund Substitute," which was introduced one month before CERCLA's enactment, was intended to "eliminate those features which have proven most controversial," such as "a third party cause of action for damages, including medical expenses and economic loss...." 126 Cong. Rec. 29,699 (daily ed. Nov. 14, 1980) (statement of Sen. Stafford). Extensive negotiations regarding the scope of liability and other measures ensued. *See, e.g.*, 126 Cong. Rec. 30,349 (daily ed. Nov. 20, 1980).

Ultimately, the Senate responded by adopting far narrower liability provisions in a revised version of H.R. 7020. That revised version – which was subsequently adopted by the House of Representatives and enacted into law – made two key changes. First, in keeping with the compromise position of a narrower private liability scheme, the Senate deleted those provisions that would have permitted broad private recovery of damages and economic loss. H.R. 7020, 96th Cong. § 107 (Nov. 24, 1980).

Second, and of critical import here, the Senate rewrote CERCLA § 107(a)(4)(B) into its final form. In the previous version of S. 1480, the predecessor to that section would have created liability for "any other costs or expenses

incurred by ***any person*** to remove a hazardous substance...." S. 1480, 96th Cong. § 4(a)(4)(B) (Nov. 18, 1980) (emphasis added). In contrast, the new Senate version of H.R. 7020 provided for liability of "any other necessary costs of response incurred by ***any other person***...." H.R. 7020, 96th Cong. § 107(a)(4)(B) (Nov. 24, 1980) (emphasis added).

This evolution directly contradicts the Eighth Circuit's premise that the phrase "'any other person' means any person other than the statutorily enumerated 'United States Government or a State or an Indian tribe.'" *Atl. Research*, 459 F.3d at 835. While making various changes to sharply limit the scope of private rights under CERCLA, the Senate added the crucial second "other" to § 107(a)(4)(B). That addition in such a context evidences a plain intent to restrict the broad preceding version, which would have permitted recovery "by any person." Simply put, ***the change from "any person" to "any other person" means that some "persons" were meant to be left out***. Where Congress was acting to otherwise sharply limit private rights, it is clear who was meant to be excluded – the categories of private parties described in the preceding § 107(a)(1)-(4). Their rights were addressed with the contribution provisions of § 113(f), which were enacted in 1986.

In contrast, the predecessors to § 107(a)(4)(A)–(B) in S. 1480 were wholly adequate to separate private claims from claims afforded to public entities. They distinguished "costs of removal" incurred "by the United States Government or a state" from "any other costs or expenses incurred by any person." *Id.* If the Senate only meant to establish a category of claims separate from government claims, the changes in its adoption of H.R. 7020 would have been unnecessary. By adding further qualification, Congress accomplished its broader expressed goal of narrowing private rights by limiting § 107(a)(4)(B) to persons "other" than those deemed culpable under § 107(a)(1)–(4).

C. THE PRIMARY ROLE OF CERCLA IS TO FURTHER GOVERNMENT CLEANUP, ENFORCEMENT, SETTLEMENT AND OVERSIGHT.

The United States' plain reading of § 107(a)(4)(B) and Congress' changes to that section to limit private rights are fully consistent with CERCLA's true role – enhancement of government authority to address contaminated sites. Congress was faced with the problem that private parties were undertaking little or no remedial action. It responded not by granting rights to those responsible for the pollution (as the Eighth Circuit implicitly suggests),[5] but rather by strengthening federal response and enforcement powers. Specifically, CERCLA provided the United States with "'the tools necessary for a prompt and effective response to problems of national magnitude resulting from hazardous waste disposal.'" *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986) (quoting *United States v. Reilly Tar & Chem. Corp.*, 546 F. Supp. 1100, 1112 (D. Minn. 1982)).[6]

CERCLA's text readily illustrates that its various provisions created badly needed public enforcement authority to clean up contaminated sites and, as necessary, to compel private parties to cooperate in such efforts. *See, e.g.*, 42 U.S.C. § 9604(a) (federal removal of hazardous substances); 42 U.S.C. § 9604(e) (federal demand for information relevant to hazardous substance contamination); 42 U.S.C. § 9606(a)

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[5] *See Atl. Research*, 459 F.3d at 837 (suggesting that CERCLA was enacted to "encourag[e]" the "voluntary cleanup of contaminated sites").

[6] *See also Bestfoods*, 524 U.S. at 55, *United States v. Monsanto Co.*, 858 F.2d 160, 167 (4th Cir. 1988); *Witco Corp. v. Beckhuis*, 38 F.3d 682, 688 (3d Cir. 1994); *Sidney S. Arst Co. v. Pipefitters Welfare Educ. Fund*, 25 F.3d 417, 420 (7th Cir. 1994); *Kaiser Aluminum & Chem. Corp. v. Catellus Dev. Corp.*, 976 F.2d 1338, 1340 (9th Cir. 1992); *Anspec Co. v. Johnson Controls, Inc.*, 922 F.2d 1240, 1247 (6th Cir. 1991); *United States v. Aceto Agric. Chems. Corp.*, 872 F.2d 1373, 1380 (11th Cir. 1989).

(administrative remediation orders); 42 U.S.C. § 9606(b) ($25,000 daily fine for non-compliance with federal order); 42 U.S.C. § 9607(a)(4)(A) (cost recovery actions); 42 U.S.C. § 9607(e) (barring agreements to protect PRPs from cost recovery claims); 42 U.S.C. § 9607(f) (natural resources liability). In contrast, the Eighth Circuit attempts to draw its inference of a broad purpose to promote voluntary cleanup from just one statutory sentence – § 107(a)(4)(B).

CERCLA's legislative history further affirms that enforcement – not voluntary private remediation – was Congress' principal focus. Congressman Florio, in describing the legislation, stated: "Both Houses addressed the key concerns which had to be dealt with in hazardous substance legislation" by ensuring that "the Government has been given the necessary authority to respond to hazardous substance releases." 126 Cong. Rec. 31,964 (daily ed. Dec. 3, 1980). Similarly, Senator Leahy, remarking on the legislation, stated that CERCLA was designed to ensure that "the Federal Government's ability to respond to incidents involving hazardous and highly toxic substances will be greatly strengthened." *Id.* at 30,971 (Nov. 24, 1980); *see also id.* (Senator Chafee observing that CERCLA was intended to provide "a tool for holding liable those who are responsible for these costs").

Nor did Congress' subsequent authorization of contribution claims under the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Pub. L. 99-499, 100 Stat. 1613, alter this equation. Congress did not enact the focused rights existing under § 113(f) to further cleanups of the sort performed by Atlantic Research here, Con Ed in the Second Circuit case, or Aviall Services in the Fifth Circuit proceeding. Rather, it provided a proportionate private party ***response*** to enforcement action where such enforcement created uneven liability. In other words, SARA limited the side-effects of CERCLA's joint and several liability scheme. As stated by the Senate Committee on Environment and Public Works upon reporting the bill that became law, "when

joint and several liability *is imposed* under Section 106 or 107 of the Act, *a concomitant right of contribution* exists under CERCLA." *See* 99 Cong. Sen. Rep. 11 at *44 (emphasis added). That says nothing of voluntary remediation.

The contribution rights created by Congress directly enhance federal remedial and enforcement efforts. Presuming § 107(a) is read properly, § 113(f)(3)(B) strongly encourages private entities to enter into "administrative or judicially approved settlement[s]" by creating a right to contribution for those who cooperate. § 113(f)(3)(B). Congress further lured liable parties to acquiesce to government demands by providing the "carrot" of contribution protection for settling parties. *See* § 113(f)(2). Those provisions create limited private rights only in response to government action.

This Court's decision in *Cooper Industries* corrected the courts that had strayed from § 113(f)(1)'s statutory text by attempting to broaden it into a general private cause of action. That same guidance is now necessary in the context of § 107(a). The Eighth Circuit's approach would once again unbalance CERCLA's "cause and effect" statutory scheme. Instead of limiting private cost recovery claims to parties "other" than PRPs, it would broaden that right to anyone and everyone. Such an approach would permit parties deemed legally responsible under CERCLA to bypass Congress' express restrictions in § 113(f) and instead use CERCLA to first suppose and then resolve inequities that the statutory scheme did not create. As aptly described by the United States, Br. for U.S. at 36-46, permitting covered persons under § 107(a)(1)-(4) to avoid Congress' contribution scheme through the creation of a new cost recovery action would significantly impair (rather than advance) enforcement activity.[7]

[7] The effect that enabling almost limitless § 107 claims would have on state law also supports a limited reading of § 107. The court below

II. A NEW § 107 RIGHT WOULD RESULT IN NEEDLESS UNCERTAINTY AND UNFAIR EXPOSURE FOR DEFENDANT PRPS.

A PRP cost-recovery claim will damage CERCLA's statutory structure and burden defendant PRPs with additional, protracted CERCLA litigation over the scope and application of that claim. The primary structural harm involves § 113(f), which will no longer provide the incentives and protections it promises because a PRP cost-recovery claim under § 107 offers a far more powerful remedy than a § 113 contribution claim. Section 107(a) makes each PRP strictly liable for the *entire* cleanup cost. In contrast, § 113(f) provides for contribution claims that allocate costs among PRPs based on "equitable factors," § 113(f)(1), and carry a shorter limitations period. *Compare* §§ 113 (g)(2) & (g)(3); 9613(g)(2) & (g)(3).

The court of appeals contends that its new § 107 claim is needed to prevent the government from evading liability. *See Atl. Research*, 459 F.3d at 837. But this is factually unwarranted, *see* Br. for U.S. at 44-45, and ignores the effects that creating such a claim will have on CERCLA cases in which the United States is not potentially liable, including cases in which *amici* are involved. In most cases, the court of appeals' concern will have no bearing.

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opined that "CERCLA effectively transformed centuries of real property and tort liability law by making those who contaminate a site strictly liable for the costs of subsequent cleanup by others...." *Atl. Research*, 459 F.3d at 830 (citations omitted). If Congress had meant to eradicate fundamental contract, property and tort jurisprudence in all circumstances – rather than in a limited subset involving government enforcement – there would certainly have been mention of that fact in CERCLA's statutory text and legislative history. There is not, and that silence is telling.

The first untoward side-effect of manufacturing a new § 107 PRP claim would be the creation of a powerful incentive for PRPs to avoid settling with the government in order to remain "voluntary" and thus ensure eligibility for the new right of cost recovery. This runs sharply contrary to CERCLA's primary goal of enhancing public enforcement and oversight. *See* Section I.C., *supra*. "Voluntary" PRPs would attempt to use the new § 107 cost recovery claim to circumvent the statutory protection afforded persons that settle with the government. *See* §§ 113(f)(2) & 122(g)(5). PRPs that would otherwise settle to "buy peace" and achieve finality may not if they would face new demands under the theory that the protection of § 113(f)(2) extends only to "claims for contribution" and not those for "cost recovery."

Amicus MeadWestvaco is involved in just such a case, *Solutia, Inc. v. McWane*, No. CV-03-PWG-1345-E, which is pending before the United States District Court for the Northern District of Alabama. MeadWestvaco is among a group of settling companies that agreed to conduct a removal action at a site in Anniston, Alabama. As a part of that settlement, MeadWestvaco received contribution protection from the government under § 113(f)(2). Yet despite that protection, MeadWestvaco and the other settling parties have been sued on the precise § 107(a)(4)(B) theory now before this Court. Such claims will greatly deter settlement and preclude further cooperative remedial efforts under proper EPA supervision.

Second, the expected allegation that the new § 107 cost recovery claim would shift the entire remediation cost to each defendant, jointly and severally, is inconsistent with the pro rata allocation that § 113 provides. The Second and Eighth Circuits attempt to resolve this conflict by suggesting that the liabilities would be allocated equitably through § 113 contribution counterclaims. *Conol. Edison*, 423 F.3d at 100 n.9; *Atl. Research*, 459 F.3d at 835. But that tactic does not solve the core inequalities created by the proposed new claim. Section § 107 plaintiffs will argue that the burden of

proof for proper allocation has shifted to the defendants instead of falling on the plaintiff as it would in a § 113 action. Section 107 plaintiffs would also contend that, under the rule of joint and several liability, the defendant must assume the "orphan shares" attributed to insolvent or missing PRPs. Further, if the PRP plaintiff settled with the government and obtained contribution protection under § 113(f)(2), it would no doubt contend it was wholly immune from the defendant's § 113(f) contribution counterclaims.

Thus, a PRP § 107 claim would impose substantial unfair burdens on defendants, especially those whose involvement with a site was long ago and poorly documented. *Amicus* UGI Utilities is an exemplar: it was sued over events that took place more than a century ago. If this Court allows the PRP § 107 claim created by the court of appeals, the lower courts will have to resolve whether defendants like UGI must bear the burden of proving the extent of the parties' involvement, even though the party suing has admitted its partial responsibility for the cleanup and even though such defendants will be hobbled by documentation and witnesses lost as a result of the long passage of time.

Because the cleanup for which a § 107 claim would seek recovery is, by definition, completed without government oversight, the tools available to the § 107 plaintiff could also result in costs being imposed upon defendants for a cleanup that was inefficient, incomplete or overbroad. A plaintiff PRP's incomplete "voluntary" cleanup could be ordered redone by the government at some later date, with the defendant PRPs that paid for the first cleanup unfairly tapped to pay for a second.

It might be tempting as a matter of policy to argue that a § 107 claim would encourage prompt cleanup by bestowing cost-recovery rights on PRP plaintiffs that are denied to PRP defendants. *See Consol. Edison*, 423 F.3d at 102 (only a party that "has not been sued" may use § 107).

But, aside from the inefficiencies that would result from this sort of race to the courthouse, that policy would necessarily be inequitable. There is only one PRP – the landowner – that is in a position to conduct voluntary cleanup. Landowners are not likely to grant access to former owners or waste disposers to conduct a cleanup, especially if it means the landowner would then be subject to the type of § 107 claim the Eighth Circuit envisions. Even if it were consistent with the text and Congress' meaning, the Eighth Circuit's new § 107 right would thus create further inequities by empowering only a limited subset of PRPs, at the expense of those who are unable to conduct a "voluntary" cleanup. Those who are left out would find themselves targeted in lawsuits without the benefits of government-supervised cleanup, the restriction of a shorter statute of limitations under § 113(g) and the shelter of contribution protection under § 113(f)(2).

Wholly apart from these inconsistencies, a PRP cost-recovery claim would create numerous new factual and legal quagmires to be litigated, thus consuming parties' and courts' limited resources. For example, the "voluntary" limitation that the courts below have grafted onto their newly-minted § 107 right (which has no statutory basis but is created to prevent the complete displacement of § 113(f)) would raise another nebulous issue for further litigation: Which plaintiffs are "voluntary"? As the Second Circuit itself has already conceded, this "makes relevant . . . whether and to what extent plaintiffs incurred response costs voluntarily . . . [which] is of course a question of fact," *AMW Materials Testing, Inc. v. Town of Babylon*, No. 05-206-CV, 2006 WL 851772, at *1 (2d Cir. Mar. 28, 2006) (unpublished summary order). Whether a putative § 107 PRP plaintiff is only "partly responsible," *Atl. Research*, 459 F.3d at 829, or "did not pollute the site in any way," *Metro. Water Dist. of Greater Chi. v. N. Am. Galvanizing & Coatings, Inc.*, 473 F.3d 824, 836 (7th Cir. 2007), are the sorts of factual questions that would be litigated at length under a new § 107 structure.

Additional questions will arise in determining whether parties that are conducting voluntary cleanups under the "Brownfields Program" and protected from government action, *see* 42 U.S.C. § 9628(b), would qualify for § 107 claims against others and, if so, under what circumstances. Conversely, will parties who thought themselves entitled to that protection find themselves facing § 107 claims? Limiting § 107(a) claims to some but not all PRPs, as the Second and Eighth Circuits have suggested, would mean that simply establishing CERCLA liability will no longer suffice as the threshold finding in a CERCLA lawsuit. Rather, parties will be required to litigate factual questions over the *circumstances* of liability, substantially increasing the burdens on parties and courts alike.

* * * *

Allowing new § 107 rights would prompt additional rounds of costly litigation to establish metes and bounds for the new cause of action, mirroring the two decades of litigation that already have been devoted to establishing the limits of Congress' § 113 remedy. Many of those issues could not be addressed here, because this case does not present, for example, the need to reconcile multiple § 107 claims asserted by PRPs or the scope of contribution protection for a PRP that has settled with the government. This would impose a substantial additional burden on the federal judiciary and give rise to repeated requests for this Court to resolve many new issues in the years to come.

There is no justification for imposing these burdens on courts and litigants. As the government has aptly described, CERCLA's text and structure amply serve Congress' goals of remediation and responsibility. Upsetting the remedies and structure Congress chose is not, contrary to the court of appeals' conclusion, justified by the (mis)perceived goal of maximizing "voluntary" cleanups:

> [N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice – and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law.

Rodriguez v. United States, 480 U.S. 522, 525-26 (1987) (emphasis in original). Because the new § 107 claim crafted by the courts below is contrary to the statute's text, inconsistent with its structure and purpose, and burdensome to administer, the creation of that claim is unwarranted and ill conceived.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION

Civil Action No. 3:97-CV-1926-D

TEXAS, DALLAS DIVISION AVIALL SERVICES, INC.,
Plaintiff-counterdefendant,

vs.

COOPER INDUSTRIES, LLC,
Defendant-counterplaintiff.

August 8, 2006, Decided
August 8, 2006, Filed

MEMORANDUM OPINION AND ORDER

The court must decide whether a private potentially responsible person ("PRP") under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601-9675, can bring a cost recovery or contribution action under *CERCLA* § 107(a) or under federal common law against another PRP. The court holds that it cannot.

I

The court assumes the parties' familiarity with the background facts and extensive procedural history of this case. It therefore briefly summarizes the case and adds pertinent background facts and procedural history to assist in understanding today's decision. Cooper owned four sites at which it operated an aircraft engine maintenance business. *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 163, 125 S. Ct. 577, 160 L. Ed. 2d 548 (2004). In 1981 it sold the

business to Aviall, who later discovered that both Aviall and Cooper has contaminated the soil and groundwater at the sites with hazardous substances. *Id.*[1] Aviall later sold the properties but retained contractual liability for the cleanup.

During the period when Aviall was the owner, it notified the Texas Natural Resource Conservation Commission ("TNRC") of the pollution. *Id.* at 164. TNRC advised Aviall that it was violating state environmental laws, directed it to clean up the site, and threatened enforcement action if Aviall failed to undertake remediation. *Id.* Aviall voluntarily cleaned up the properties, and neither the Environmental Protection Agency ("EPA"), TNRC, nor any other governmental entity has undertaken judicial or administrative measures against Aviall or Cooper. *Id.* No third party has sued Aviall or Cooper concerning any of the conditions or the facilities.

Aviall sued Cooper in this court seeking to recover the cleanup costs it had expended and those that it anticipated incurring in the future. *Id.* It asserted claims for cost recovery under *CERCLA* § 107(a), for contribution under *CERCLA* § 113(f)(1), and for a declaratory judgment under the federal Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, and it alleged various pendent state-law claims.[2] *Id.* Aviall amended

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[1] One of the four sites is contaminated with petroleum hydrocarbons, and the parties have stipulated that Aviall does not seek to hold Cooper liable under CERCLA for the cleanup costs incurred at this site.

[2] Aviall sought relief based on theories of breach of contract; breach of express warranty; contractual indemnification; declaratory judgment; contribution under *CERCLA* § 113(f)(1); contribution under § 361.344(a) of the Texas Solid Waste Disposal Act, *Tex. Health & Safety Code Ann.* § 361.344(a) (Vernon 1992 & Supp. 2000); contribution under § 26.3513(j) *of the Texas Water Code, Tex. Water Code Ann.* § 26.3513(j) (Vernon 1998 & Supp.2000); quantum meruit; and attorney's fees. *See Aviall Servs., Inc. v. Cooper Indus., Inc.*, 2000 U.S. Dist. LEXIS 520, 2000 WL 31730, at *1 (N.D.Tex. Jan. 13, 2000) (Fitzwater, J.), *rev'd*, 312 F.3d 677 (5th Cir. 2002) (en banc), *rev'd*, 543 U.S. 157, 125 S. Ct. 577, 160 L. Ed. 2d 548 (2004).

its complaint, dropping the independent § 107(a) claim and alleging instead under § 113(f)(1) that it was entitled to seek contribution from Cooper as a PRP under § 107(a) for response costs and other liability. *Id.*

Both parties moved for summary judgment, and the court held that Aviall could not maintain a § 113(f)(1) claim because it had not alleged any prior or pending CERCLA enforcement action against it. *See Aviall Servs., Inc. v. Cooper Indus., Inc.*, 2000 U.S. Dist. LEXIS 520, 2000 WL 31730, at *4 (N.D. Tex. Jan. 13, 2000) (Fitzwater, J.), *rev'd*, 312 F.3d 677 (5th Cir. 2002) (en banc), *rev'd*, 543 U.S. 157, 125 S. Ct. 577, 160 L. Ed. 2d 548 (2004). The court dismissed the claim without prejudice. *Id.* The CERCLA claim was the sole basis for the court to exercise subject matter jurisdiction (the parties are not diverse). Having dismissed that claim on the merits, the court declined in its discretion to exercise supplemental jurisdiction over Aviall's pendent state-law causes of action. *Id.* at *5.

Although a panel of the Fifth Circuit initially affirmed,[3] the *en banc* Fifth Circuit reversed, holding that § 113(f)(1) authorizes a PRP to seek contribution from other PRPs for cleanup costs when no civil action has been brought under § 106 or § 107(a). *Aviall Servs., Inc. v. Cooper Indus., Inc.*, 312 F.3d 677, 691 (5th Cir. 2002) (en banc), *rev'd*, 543 U.S. 157, 125 S. Ct. 577, 160 L. Ed. 2d 548 (2004). The Supreme Court granted certiorari, *Cooper Industries, Inc. v. Aviall Services, Inc.*, 540 U.S. 1099, 124 S. Ct. 981, 157 L. Ed. 2d 811 (2004), and reversed and remanded, holding that § 113(f) "authorizes contribution claims only 'during or following' a civil action under § 106 or § 107(a), and it is undisputed that

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[3] *Aviall Servs., Inc. v. Cooper Indus., Inc.*, 263 F.3d 134 (5th Cir. 2001), *reh'g granted en banc*, 278 F.3d 416 (5th Cir. 2001), *rev'd*, 312 F.3d 677 (5th Cir. 2002) (en banc), *rev'd*, 543 U.S. 157, 125 S. Ct. 577, 160 L. Ed. 2d 548 (2004).

Aviall has never been subject to such an action." *Cooper Indus.*, 543 U.S. at 168.

Aviall and amicus Lockheed Martin Corporation contended in the Supreme Court that if Aviall could not recover under § 113(f), it could do so under § 107(a), despite its PRP status. Id. The Court noted that neither this court, the Fifth Circuit panel, nor the en banc Fifth Circuit had considered a § 107(a)claim. *Id.* It concluded that both the § 107(a) claim and the question whether Aviall had waived the claim "merit[ed] full consideration by the courts below." Id. at 169 ("Both the question whether Aviall has waived this claim and the underlying § 107 question (if it is not waived) may depend in part on the relationship between §§ 107 and 113."). Accordingly, the Court remanded for further proceedings consistent with its opinion. Two justices dissented, stating that the Court "unnecessarily defers decision on Aviall's entitlement to recover cleanup costs" under § 107. *Id.* at 171-72 (Ginsburg, J., dissenting). The dissenting justices indicated that they viewed § 107 as providing a cause of action for PRPs to recover from other PRPs. *See id.*

On remand to the Fifth Circuit, the *en banc* court ordered the case remanded to this court "with instructions to permit Aviall . . . to amend its complaint, if necessary, to assert, free of any challenge of waiver or forfeiture, whatever statutory claims it urges in light of the Supreme Court's decision, without prejudice to Cooper['s] . . . other defenses." *Aviall Servs., Inc. v. Cooper Indus., Inc.*, No. 00-10197, order at 1-2 (5th Cir. Feb. 15, 2005) (en banc) (order).[4]

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[4] In response to the Fifth Circuit's order, Cooper filed in the Supreme Court a petition for a writ of mandamus. It maintained that the Fifth Circuit contravened the Supreme Court's mandate "when, without the benefit of any substantive briefing or argument, [the Fifth Circuit] issued a remand order to 'permit Aviall . . . to amend its complaint . . . free of any challenge of waiver or forfeiture' despite [the Supreme] Court's express determination that the 'preliminary waiver question' should, on re-

Under the Fifth Circuit's order, this court permitted Aviall to file its third amended complaint ("third complaint").[5] Aviall sues Cooper on theories of cost recovery under CERCLA § 107(a), 42 U.S.C. § 9607(a), for response costs incurred or to be incurred under CERCLA; in the alternative, contribution under CERCLA § 107, 42 U.S.C. § 9607; common law contribution under state and federal law to recover its response costs attributable to Cooper; contribution under the Texas Solid Waste Disposal Act, Tex. *Health & Safety Code Ann.* § 361.344(a) (Vernon 2001 & Supp. 2005); contribution under the Texas Water Code, *Tex. Water Code Ann.* § 26.3513(j) (Vernon 2000 & Supp. 2005); breach of contract; breach of warranty; contractual indemnification; declaratory judgment; quantum meruit; and attorney's fees. Cooper asserts two counterclaims. First, it seeks contribution under *CERCLA* § 113(f)(1) to the extent there have been any releases or threatened releases of hazardous substances within the meaning of § 107(a). Second, Cooper sues for contractual indemnification, release, and breach of contract under Texas law.

The parties have filed several substantive motions, but the one logically addressed first is Cooper's motion for partial

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mand from [the Supreme] Court, receive 'full consideration by the courts below.'" Pet. for Writ of Mandamus, *In re Cooper Indus., Inc.*, 544 U.S. 1031, 125 S. Ct. 2255, 161 L. Ed. 2d 1081 (2005) (No.04-1182). Pending disposition of the petition in the Supreme Court, this court stayed the proceedings until the Supreme Court denied mandamus on May 16, 2005. *See id.*

[5] Cooper "respectfully recognizes that the Fifth Circuit's instruction allowing Aviall to assert CERCLA statutory claims 'free of any challenge of waiver or forfeiture' precludes this Court from further addressing Cooper's strong waiver defenses to Aviall's renewed *CERLA* § 107(a) claims at this time." D. Br. 3 n.3. Although Aviall contends it "never dropped its § 107(a) [claim], . . . this point is moot," "[g]iven the Fifth Circuit's mandate." P. Br. 2. Pursuant to the Fifth Circuit's order, the court will not address the waiver issue.

summary judgment on all federal claims. If as a matter of law Aviall cannot recover against Cooper under CERCLA or federal common law, the court will as before dismiss Aviall's federal-law claims and decline to exercise supplemental jurisdiction, and the parties can continue this litigation in state court based on state law. Cooper maintains that Aviall cannot bring a cost recovery action under *CERCLA* § 107(a) because it is a PRP and that Aviall has no right of contribution under § 107(a) or federal common law. It argues that Aviall must seek contribution under § 113(f)(1), at the time when such an action can be maintained.[6]

II

The court decides first whether Aviall can bring a cost recovery action under § 107(a).

A

The parties contend this question has already been decided in this circuit. Cooper points to three decisions that it argues foreclose Aviall's claim. It cites the panel majority's opinion in *Aviall Services*, in which it observed that "[t]he § 107(a) cost recovery provision permits the government or an 'innocent' private party to recoup cleanup costs from PRPs." *Aviall Servs.*, 263 F.3d at 137. Cooper relies on the panel's conclusion that "a PRP cannot file a § 107(a) suit against another PRP; it must pursue a contribution action instead." *Id.* Under Fifth Cir. R. 41.3, however, "[u]nless otherwise expressly provided, the granting of a rehearing en banc vacates the panel opinion and judgment of the court and stays the mandate." The *en banc* court in *Aviall Services* did not adopt an exception to this Rule in abrogating the panel opinion. Accordingly, although perhaps suggestive of the views of some members of the Fifth Circuit, the panel

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[6] Of course, under the Supreme Court's decision in *Cooper Industries*, such an action would presently be premature, because Aviall has not yet been subjected to a civil action under § 106 or § 107(a) of *CERCLA*.

decision in *Aviall Services* is not binding and does not foreclose Aviall from asserting a right to bring a cost recovery action under § 107(a).

Cooper also relies on *OHM Remediation Services v. Evans Cooperage Co.*, 116 F.3d 1574 (5th Cir. 1997). In OHM Remediation the Fifth Circuit reversed a summary judgment, holding, *inter alia*, that "section 113(f) contribution actions may only be brought by persons who are liable or potentially liable under CERCLA." *Id.* at 1582. The appellee had asserted three independent grounds for affirming the appellant's § 107(a) claim that the district court had not addressed. *Id.* at 1583. One ground was that, because the appellant was a PRP, it could not bring an action under § 107(a). *Id.* The Fifth Circuit declined to reach all three grounds, noting that they "involve[d] difficult questions of fact regarding the extent of cleanup and the nature of [appellant's] involvement with the site." *Id.* Cooper argues that the panel "acknowledged that the determination of [the appellant's] historic[al] 'involvement with the site'—i.e., the factual question of whether [the appellant] was a PRP or an 'innocent party'—would be dispositive of its ability to bring a § 107(a) cost recovery claim." D. Br. 6. The court rejects Cooper's construction of *OHM Remediation*. The panel explicitly expressed "no opinion on the separate question . . . whether a PRP may seek to hold other parties jointly and severally liable under § 107(a) for response costs." *OHM Remediation*, 116 F.3d at 1582 n.1. It is that question, which the *OHM Remediation* panel did not decide, that this court resolves today.

Finally, at oral argument, Cooper contended the Fifth Circuit's recent decision in *Elementis Chromium L.P. v. Coastal States Petroleum Co.*, 450 F.3d 607 (5th Cir. 2006), forecloses a PRP from bringing a cost recovery action under § 107(a). It cites language in which the panel explicitly agreed with the following holding of the Eleventh Circuit: "'[W]hen one liable party sues another liable party under CERCLA, the action is not a cost recovery action under

§ 107(a). . . .'" *Id.* at 613 (quoting *Redwing Carriers, Inc. v. Saraland Apartments*, 94 F.3d 1489, 1513 (11th Cir. 1996)). The court disagrees with Cooper's reliance on *Elementis*. In *Elementis* the panel cited *Redwing Carriers* for the proposition that liability must be allocated under § 113(f)(1), that is, liability is not joint and several. Id. Indeed, *Elementis* held only that liability under § 113(f) is several, and it did not squarely decide whether a private PRP can bring a cost recovery action against another PRP under § 107(a).

B

For its part, Aviall maintains that the Fifth Circuit in *Tanglewood East Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568 (5th Cir. 1988), expressly allowed a PRP to recover under § 107(a). It urges that since *Tanglewood* was decided, the Fifth Circuit has consistently recognized the right of PRPs to bring cost recovery actions under § 107(a). *See Aviall Servs.*, 312 F.3d at 683; *Geraghty & Miller, Inc. v. Conoco Inc.*, 234 F.3d 917 (5th Cir. 2000); *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664 (5th Cir. 1989). The court disagrees. Although the question whether one PRP can bring a § 107(a) cost recovery claim against another PRP may have been "lurk[ing] in the record" in those cases, none squarely considered or decided it. *See Webster v. Fall*, 266 U.S. 507, 511, 45 S. Ct. 148, 69 L. Ed. 411 (1925) ("Questions which merely lurk in the record . . . are not to be considered as having [*15] been so decided as to constitute precedents.").

In *Tanglewood* the court granted an interlocutory appeal under 28 U.S.C. § 1292(b) for the limited purpose of determining whether the district court erred in rejecting defendants' motion to dismiss. *Tanglewood*, 849 F.2d at 1571. One argument that the appellant advanced on appeal was that some degree of governmental involvement was a necessary prerequisite for the application of § 107. *Id.* at 1575. In affirming the district court, the Fifth Circuit held, *inter alia*, that the plaintiffs, who were homeowners who had

purchased residential lots in a housing subdivision, had stated a claim for relief under § 107, because no "prior governmental involvement is a prerequisite to the recouping of response costs." *Id.* The court did not discuss, for instance, whether the plaintiffs qualified for the "innocent landowner defense" under § 107(b)(3) and thus were not PRPs. The possibility that the plaintiffs were PRPs was not mentioned in the opinion, much less litigated by the parties. *Cf. id.* at 1572-74 (deciding whether defendants were PRPs). Accordingly, *Tanglewood* did not decide the issue presented here.

Likewise, the other cases that Aviall cites do not support its contention that this question has been resolved. Even if the cases contain language that implicitly appears to endorse Aviall's view, none of the decisions expressly addressed the question whether a PRP could bring a cause of action under § 107. There is no indication that the issue was brought to the attention of the court or ruled on. The courts addressed distinct, even if related, questions regarding CERCLA. *See Aviall Servs.*, 312 F.3d at 682-83 (addressing whether PRPs could seek contribution from other PRPs under § 113); *Geraghty & Miller*, 234 F.3d at 924-25 (addressing which CERCLA statute of limitations applied to initial contribution action); *Amoco Oil*, 889 F.2d at 668 (addressing whether PRP was required to show that property's radioactive emissions violated quantitative threshold to establish release of hazardous substance within meaning of § 107(a)(4)).[7]

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[7] Aviall also urges that the Supreme Court's decision in *Key Tronic Corp. v. United States*, 511 U.S. 809, 114 S. Ct. 1960, 128 L. Ed. 2d 797 (1994), recognized an independent cause of action for PRPs under § 107. *Key Tronic* addressed whether a PRP could claim attorney's fees in a contribution action brought against another PRP. It did not involve the question presented to this court: whether a private PRP can bring a § 107(a) cost recovery action against another PRP. *See also Cooper Indus.*, 543 U.S. at 170 ("[W]e are not prepared—as the dissent would have it—to resolve the § 107 question solely on the basis of dictum in *Key Tronic*.").

In sum, "[t]he Fifth Circuit has not directly addressed the issue of precisely who may bring a claim under § 107(a)." *Vine Street LLC v. Keeling*, 362 F.Supp.2d 754, 763 (E.D. Tex. 2005).[8] Cooper's motion squarely presents that issue and the question whether Aviall can sue for cost recovery or contribution under CERCLA or federal common law.

III

The court now decides whether Aviall, a private PRP, can bring a cost recovery action against Cooper under § 107(a).

A

"The appropriate starting point when interpreting any statute is its plain meaning." *United States v. Elrawy*, 448 F.3d 309, 315 (5th Cir. 2006) (citing *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242, 109 S. Ct. 1026, 103 L. Ed. 2d 290 (1989)). "The plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'" *Ron Pair Enters.*, 489 U.S. at 242 (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571, 102 S. Ct. 3245, 73 L. Ed. 2d 973 (1982)).

Section 107(a) provides, in relevant part:

> Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—
>
> (1) the owner and operator of a vessel or a facility,
>
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

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[8] The court of course respectfully disagrees with the conclusion of the able district court in *Vine Street* that a PRP can bring a cost recovery action under § 107(a), even though the court did so "in the unique circumstances of th[at] case." *Vine Street*, 362 F.Supp.2d at 761.

> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and
>
> (4) any person who acceptsor accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—
>
> (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;
>
> (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan. . . .

42 U.S.C. § 9607(a).

Cooper contends the second use of the word "other" in § 107(a)(4)(B)—"any other person"—serves to distinguish from the other persons identified in the preceding text of § 107(a) those who can bring a cost recovery action under § 107(a). It maintains that § 107(a)(4)(B)'s reference to "any other person" "naturally means anyone not previously identified in this section of the statute." D. Br. 8. The effect of this interpretation is to limit § 107(a) actions to the persons listed in § 107(a)(4)(A)—the United States Government, a State, or an Indian Tribe—and persons who are not PRPs. Cooper reasons that because Aviall concedes it is a PRP within the meaning of § 107(a), Aviall does not qualify as

one of the "other" persons who can bring a § 107(a) cost recovery action.

Aviall counters that, properly interpreted, the "any other person" to which § 107(a)(4)(B) refers includes anyone who is not designated in § 107(a)(4)(A), i.e., anyone other than the United States Government, a State, or an Indian Tribe, including PRPs. It contends that because it is not the United States Government, a State, or an Indian Tribe, it falls within the class of "any other person" under § 107(a)(4)(B) who can bring a cost recovery action under § 107(a).

The parties also support their respective interpretations of § 107(a)(4)(B) by examining CERCLA as a whole. This is a proper approach. It is settled that to determine "the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *KMart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291, 108 S. Ct. 1811, 100 L. Ed. 2d 313 (1988) (citing *Bethesda Hosp. Ass'n. v. Bowen*, 485 U.S. 399, 403-405, 108 S. Ct. 1255, 99 L. Ed. 2d 460 (1988); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 220-221, 106 S. Ct. 2485, 91 L. Ed. 2d 174 (1986)). "It is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *TRW Inc. v. Andrews*, 534 U.S. 19, 31, 122 S. Ct. 441, 151 L. Ed. 2d 339 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174, 121 S. Ct. 2120, 150 L. Ed. 2d 251 (2001)). The court "must, if possible, construe a statute to give every word some operative effect." *Cooper Indus.*, 543 U.S. at 167 (citing *United States v. Nordic Vill., Inc.*, 503 U.S. 30,35-36,112 S. Ct. 1011, 117L. Ed. 2d 181 (1992)).

B

The court discerns the meaning of "any other person" in § 107(a)(4)(B) by examining CERCLA holistically. Here, the court need only consult provisions of CERCLA—particularly

those found in § 113(f)—to see that Cooper's reading of CERCLA is correct and Aviall's misplaced.

Under § 113(f)(2), "[a] party who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement." *See also* § 122(g)(5) ("A person who has resolved its liability to the United States under this subsection shall not be liable for claims for contribution regarding matters addressed in the settlement."), § 122(h)(4) (same). Under § 113(f)(3)(B),

> [a] person who has resolved its liability to the United States or a State for some or all of a response action or for some or all of the costs of such action in an administrative or judicially approved settlement may seek contribution from any person who is not party to a settlement. . . .

Id. The effect of these provisions is that

> PRPs, who choose to settle, gain protection from contribution, enjoy potentially favorable settlement terms, and retain the ability to seek contribution from other defendants. PRPs, who choose not to settle, are barred from seeking contribution from the settling PRPs and thus face potentially disproportionate liability. This system gives the United States obvious and important leverage to encourage quick and effective resolution of environmental disputes.

In re Reading Co., 115 F.3d 1111, 1119 (3d Cir. 1997).

Were the court to interpret § 107(a) as Aviall does, a PRP could bring a cost recovery action under § 107(a) against a person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement and, under § 113(f)(2), for example, would not be liable for claims for contribution regarding matters addressed in the

settlement. But because, unlike § 113(f), a claim under § 107 is not for contribution, the settling person would not be entitled to the protection of § 113(f)(2). *See Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 352 n.11 (6th Cir. 1998) ("[W]ere we to allow PRPs to seek joint and several cost recovery under § 107(a), they could do so against parties who had settled, and against whom they were precluded from seeking contribution. . . . Obviously such a result would be absurd. . . ."); *Reading*, 115 F.3d at 1119 (noting risk that "[c]onsent agreements would no longer provide protection, and settling parties would have to endure additional rounds of litigation to apportion their losses"). Thus Aviall's interpretation of § 107(a) would at a minimum render key provisions of § 113(f) superfluous, insignificant, or, in some instances, devoid of operative effect, violating a cardinal principle of statutory construction. *See TRW Inc.*, 534 U.S. at 31; *see also Cooper Indus., 543 U.S. at 167* (admonishing courts to "construe a statute to give every word some operative effect") (citing *Nordic Vill.*, 503 U.S. at 35-36).[9] The court therefore concludes that "any other person" in § 107(a)(4)(B) does not include persons who are PRPs under § 107(a)(1)-(4).

C

This understanding of the plain meaning of § 107(a)(4)(B) is supported by well-reasoned precedent. Before the Supreme Court decided Cooper Industries, all the circuits that had

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[9] Cooper maintains, *inter alia*, that recognizing Aviall's claim would provide a § 107(a) claimant a longer period of limitations and a lower standard of proof. "CERCLA contains different statutes of limitations for section 107(a) cost-recovery actions and for section 113 contribution actions." *Geraghty & Miller*, 234 F.3d at 923-24 (citing § 113(g)(2)(B) and 113(g)(3)). Cooper is therefore correct that another consequence of recognizing a direct cost recovery action under § 107(a) by one private PRP against another PRP is to enlarge the limitations period that Congress envisioned for filing what are essentially actions for contribution.

addressed the question had concluded that, except for so-called "innocent" PRPs,[10] § 107(a) does not confer on a PRP a claim for cost recovery or contribution against another PRP. These circuits held that § 113(f)(1) explicitly provides PRPs a right of contribution and § 107(a) does not. *See Dico, Inc. v. Amoco Oil Co.*, 340 F.3d 525, 530-31 (8th Cir. 2003); *Morrison Enters. v. McShares, Inc.*, 302 F.3d 1127, 1135 (10th Cir. 2002);[11] *Axel Johnson, Inc. v. Carroll Carolina Oil Co.*, 191 F.3d 409, 415 (4th Cir. 1999); *Centerior Serv. Co.*, 153 F.3d at 356; *Pinal Creek Group v. Newmont Mining Corp.*, 118 F.3d 1298, 1301 (9th Cir. 1997); New Castle County v. Halliburton NUS Corp., 111 F.3d 1116, 1124 (3d Cir. 1997);[12] *Redwing Carriers*, 94 F.3d at 1496; *United Techs. Corp. v. Browning-Ferris Indus., Inc.*, 33 F.3d 96, 101 (1st Cir. 1994); *Akzo Coating, Inc. v. Aigner Corp.*, 30 F.3d 761, 764 (7th Cir. 1994). Admittedly, the cases involved slightly different factual scenarios than does this one. In all but one—*Pinal Creek Group*, 118 F.3d at 1301—the PRPs seeking relief under § 107(a) had either been held liable or

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[10] *See NutraSweet Co. v. X-L Eng'g Co.*, 227 F.3d 776, 784 (7th Cir. 2000) (holding "innocent" PRP, who "did not pollute the site in any way," was entitled to bring cost recovery action against PRP under § 107); *Rumpke of Ind., Inc. v. Cummins Engine Co.*, 107 F.3d 1235, 1240 (7th Cir. 1997) (holding "innocent" PRP who was not subject to government order or judgment could bring § 107 cost recovery action against PRP); *Akzo Coating, Inc. v. Aigner Corp.*, 30 F.3d 761, 764 (7th Cir. 1994) (noting that "innocent" PRPs may bring § 107 claims in certain instances).

[11] *See Morrison Enters.*, 302 F.3d at 1135 n.2 ("We . . . do not reach the question of whether our analysis would change if a PRP was unable to pursue an action for contribution and would therefore be barred from any recourse under CERCLA."); *see also United States v. Col. & E. R.R. Co.*, 50 F.3d 1530, 1536 (10th Cir. 1995) (holding cross-claim by PRP, defendant in suit by EPA, against other PRP properly characterized as § 113 rather than § 107 cause of action).

[12] *See also N.J. Tpk. Auth. v. PPG Indus., Inc.*, 197 F.3d 96, 104 (3d Cir. 1999) (observing PRP's suit against other PRPs properly characterized as one for contribution under § 113).

had been the subject of an administrative or court order or judgment. *See Consol. Edison Co. of N.Y. v. UGI Utils., Inc.*, 423 F.3d 90, 102-03 (2d Cir. 2005) (citing cases). Unlike Aviall, the PRPs would presumably have had a § 113(f) contribution action available to them.

Aviall attempts to distinguish these cases on the basis that they were premised on the undisputed right of PRPs to seek cost recovery under CERCLA. It fails, however, to identify the parts of the opinions that relied on the fact that PRPs had an undisputed right to cost recovery. Moreover, the reasoning of the opinions cited the text of CERCLA, its statutory structure, and congressional intent in concluding that PRPs could not bring claims under § 107(a). *See, e.g., Pinal Creek*, 118 F.3d at 1301 ("The text of § 107 leads to the conclusion that only a claim for contribution lies between PRPs."); *Centerior Serv.*, 153 F.3d at 350 n.11 ("[P]arties seeking contribution under § 113(f) must look to § 107 to establish the basis and elements of the liability of the defendants, as well as any defenses to that liability."); *United Techs. Corp.*, 33 F.3d at 102 ("[A]ppellants' construction emasculates the contribution protection component of CERCLA's settlement framework.").

As has this court, several decisions focused on the relationship between §§ 107(a) and 113(f) in concluding that § 113(f)—not § 107(a)—is the statutory mechanism for a PRP to recover necessary response costs. *See Centerior Serv. Co.*, 153 F.3d at 352 ("Our reading of the statute limiting the PRP plaintiffs to contribution, gives meaning to the language in § 107(a) referring to any person, as well as the explicit contribution provisions found in § 113(f)."); *Pinal Creek*, 118 F.3d at 1302 ("[W]hile § 107 created the right of contribution, the 'machinery' of § 113 governs and regulates such actions, providing the details and explicit recognition that were missing from the text of § 107. . . ."); *New Castle County*, 111 F.3d at 1122 ("[S]ection 113 does not in itself create any new

liabilities; rather, it confirms the right of a potentially responsible person under section 107 to obtain contribution from other potentially responsible persons."). This court agrees with these decisions to the extent they conclude that, although § 107 creates the general liability scheme, e.g., by identifying the relevant parties, §§ 107 and 113 create two distinct remedies. Nothing in *Cooper Industries* calls into question this understanding of the relationship between §§ 107 and 113, as described in the pre-Cooper Industries circuit case law.

D

The court recognizes that since *Cooper Industries* was decided, the courts that have addressed this question are divided.[13] This court, which undoubtedly will not have the

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[13] *Compare Consol. Edison Co.*, 423 F.3d 90 (allowing PRP to bring § 107(a) claim), *petition for cert. filed*, 74 U.S.L.W. 3600 (U.S. Apr. 14, 2006) (No. 05-1323); *City of Bangor v. Citizens Commc'ns Co.*, 2006 U.S. Dist. LEXIS 44967, 2006 WL 1868332 (D. Me. June 27, 2006) (same); *Raytheon Aircraft Co. v. United States*, 435 F. Supp. 2d 1136, 2006 WL 1517762 (D. Kan. May 26, 2006) (same); *Sunnyside Dev. Corp. v. Opsys U.S. Corp.*, 2006 U.S. Dist. LEXIS 26655, 2006 WL 1128039 (N.D. Cal. Apr. 27, 2006) (same); *McDonald v. Sun Oil Co.*, 423 F.Supp.2d 1114 (D. Or. 2006) (same); *Aggio v. Estate of Aggio*, 2005 U.S. Dist. LEXIS 37428, 2005 WL 2277037 (N.D. Cal. Sept. 19, 2005) (same), *appeal docketed*, No. 06-15989 (9th Cir. May 30, 2006); *Ferguson v. Arcata Redwood Co.*, 2005 U.S. Dist. LEXIS 18015, 2005 WL 1869445 (N.D. Cal. Aug. 5, 2005) (same); *Viacom, Inc. v. United States*, 404 F.Supp.2d 3 (D.D.C. 2005) (same); *Kotrous v. Goss-Jewett Co. of N. Cal.*, 2005 U.S. Dist. LEXIS 18013, 2005 WL 1417152 (E.D. Cal. June 16, 2005) (same); *Adobe Lumber, Inc. v. Taecker*, 2005 U.S. Dist. LEXIS 15374, 2005 WL 1367065 (E.D. Cal. May 24, 2005) (same); *Metro. Water Reclamation Dist. of Greater Chi. v. Lake River Corp.*, 365 F.Supp.2d 913 (N.D. Ill.) (same), *appeal docketed*, No. 05-3299 (7th Cir. Aug. 4, 2005); *Vine Street*, 362 F.Supp.2d 754 (same) with *Spectrum Int'l Holdings, Inc. v. Universal Coops., Inc.*, 2006 U.S. Dist. LEXIS 49716, 2006 WL 2033377 (D. Minn. July 17, 2006) (holding that PRP has no cause of action under § 107(a)); *Adobe Lumber, Inc. v. Hellman*, 2006 U.S. Dist. LEXIS 8564, 2006 WL 349697 (E.D. Cal. Jan. 4) (same),

final word on this question, has reached the conclusion that § 107(a) does not confer on a private PRP a statutory right to bring a cost recovery action. Congresscreated a separate remedy in § 113(f)—the contribution provision—for private PRPs to recover response costs from other PRPs. Because Aviall concedes that it is a PRP, it is relegated to bringing an action against Cooper under § 113(f), after the conditions for doing so have been met.[14] If this interpretation of CERCLA leaves a remedial gap that Congress thinks it wise to fill, it can do so by amending CERCLA.

IV

The court considers next whether Aviall can bring a contribution claim against Cooper under § 107(a) or federal common law.

In *Cooper Industries* the Supreme Court noted that, after CERLCA was enacted but before it was amended by the

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appeal docketed, No. 06-16019 (9th Cir. June 7, 2006); *R.E. Goodson Constr. Co. v. Int'l Paper Co.*, 2005 U.S. Dist. LEXIS 42909, 2005 WL 2614927 (D.S.C. Oct. 13, 2005) (same); *Montville Twp. v. Woodmont Builders, LLC*, 2005 U.S. Dist. LEXIS 18079, 2005 WL 2000204 (D.N.J. Aug. 17, 2005) (same); *City of Rialto v. U.S. Dep't of Def.*, 2005 U.S. Dist. LEXIS 26941 (C.D. Cal. Aug. 16) (same), *appeal docketed*, No. 05-56749 (9th Cir. Nov. 22, 2005); *Boarhead Farm Agreement Group v. Advanced Envtl. Tech. Corp.*, 381 F.Supp.2d 427 (E.D. Pa. 2005) (same); *Blue Tee Corp. v. ASARCO, Inc.*, 2005 U.S. Dist. LEXIS 15360, 2005 WL 1532955, at *6 (W.D. Mo. June 27, 2005) (same); *Atl. Research Corp. v. United States*, 2005 U.S. Dist. LEXIS 20484 (W.D. Ark. June 1) (same), *appeal docketed*, No. 05-3152 (8th Cir. Aug. 8, 2005); *City of Waukesha v. Viacom Int'l Inc.*, 362 F.Supp.2d 1025 (E.D. Wis. 2005) (same); *Mercury Mall Assocs. v. Nick's Mkt., Inc.*, 368 F.Supp.2d 513 (E.D. Va. 2005) (same). Before the Second Circuit decided Consolidated Edison, district courts in the circuit had concluded that PRPs were barred from bringing § 107(a) claims. *See, e.g., Elementis Chems., Inc. v. TH Agric. & Nutrition*, LLC, 373 F.Supp.2d 257 (S.D.N.Y. 2005).

[14] In view of this conclusion, the court need not reach Cooper's alternative summary judgment contention that Aviall has not met the National Contingency Plan requirements for asserting such a claim.

Superfund Amendments and Reauthorization Act ("SARA"), "[a] number of District Courts nonetheless held that, although CERCLA did not mention the word 'contribution,' such a right arose either impliedly from provisions of the statute, or as a matter of federal common law." *Cooper Indus.*, 543 U.S. at 162 (collecting cases). The Court observed that this "conclusion was debatable in light of two decisions of this Court that refused to recognize implied or common-law rights to contribution in other federal statutes." *Id.* (citing *Tex. Indus., Inc. v. Radcliffe Materials, Inc.*, 451 U.S. 630, 638-47, 101 S. Ct. 2061, 68 L. Ed. 2d 500 (1981) (declining to recognize implied or common-law contribution right under *Sherman Act or Clayton Act*); *Nw. Airlines, Inc. v. Transport Workers Union of Am.*, 451 U.S. 77, 90-99, 101 S. Ct. 1571, 67 L. Ed. 2d 750 (1981) (declining to recognize implied or common-law contribution right in Equal Pay Act of 1963 or Title VII of the Civil Rights Act of 1964); *see also Aviall Servs.*, 312 F.3d at 683 (citing *Texas Industries* and *Northwest Airlines* and noting that they "had cast doubt on the ability of federal courts to fashion implied rights of contribution under federal statutes"). In addressing the possibility that Aviall would opt "to frame its § 107 claim on remand as an implied right of contribution (as opposed to a right of cost recovery)," the Court explicitly declined to decide "whether any judicially implied right of contribution survived the passage of SARA." *Cooper Indus.*, 543 U.S. at 170-71. Its observations nevertheless suggest disapproval of such an argument. It noted that it had "visited the subject of implied rights of contribution before," and it cited *Texas Industries*, in which it had declined to recognize an implied or common-law contribution right. *Id.* at 171. And the Court "also note[d] that, in enacting § 113(f)(1), Congress explicitly recognized a particular set (claims 'during or following' the specified civil actions) of the contribution rights previously implied by courts from provisions of CERCLA and the common law." *Id.* (citing *Transamerica Mortgage Advisors,*

Inc. v. Lewis, 444 U.S. 11, 19, 100 S. Ct. 242, 62 L. Ed. 2d 146 (1979)).

These observations are consistent with settled principles that the Supreme Court has applied in choosing whether to recognize implied remedies generally and in CERCLA in particular. Concerning implying remedies under federal common law, the Supreme Court has stated that "contribution does not implicate 'uniquely federal interests' of the kind that oblige courts to formulate federal common law." *Texas Indus.*, 451 U.S. at 642. Moreover, it is a "'frequently stated principle of statutory construction . . . that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies.'" *Nw. Airlines*, 451 U.S. at 94 n.30 (quoting *Nat'l R.R. Passenger Corp v. Nat'l Ass'n of R.R. Passengers*, 414 U.S. 453, 458, 94 S. Ct. 690, 38 L. Ed. 2d 646 (1974)). "In the absence of strong indicia of contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate." *Middlesex County Sewerage Auth. v. Nat'l Sea Claims Ass'n*, 453 U.S. 1, 15, 101 S. Ct. 2615, 69 L. Ed. 2d 435 (1981). It is an "elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Transamerica Mortgage*, 444 U.S. at 19. "[W]here Congress has provided 'elaborate enforcement provisions' for remedying the violation of a federal statute, as Congress has done with . . . CERCLA, 'it cannot be assumed that Congress intended to authorize by implication additional judicial remedies. . . .'" *Meghrig v. KFC W., Inc.*, 516 U.S. 479, 487-88, 116 S. Ct. 1251, 134 L. Ed. 2d 121 (1996) (quoting *Middlesex County*, 453 U.S. at 14).

Section 113(f)(1) provides a PRP the express right to seek contribution from another PRP; § 107(a) does not. Considering the Supreme Court's cautionary statements in *Cooper Industries* and other decisions that reject the adoption of

implied remedies—particularly where, as here, the statute expressly confers a right of contribution—the court holds there is no implied right of contribution under § 107(a) or federal common law.

Moreover, in *Cooper Industries* the Court addressed the proper interpretation of § 113(f)(1). It reasoned that

> if § 113(f)(1) were read to authorize contribution actions at any time, regardless of the existence of a § 106 or § 107(a) civil action, then Congress need not have included the explicit "during or following" condition. In other words, Aviall's reading would render part of the statute entirely superfluous, something we are loath to do. Likewise, if § 113(f)(1) authorizes contribution actions at any time, § 113(f)(3)(B), which permits contribution actions after settlement, is equally superfluous. There is no reason why Congress would bother to specify conditions under which a person may bring a contribution claim, and at the same time allow contribution actions absent those conditions.

Cooper Indus., 543 U.S. at 166 (citation omitted). Applying this rationale to the proper interpretation of § 107(a), if the explicit "during or following" condition of § 113(f)(1) would be rendered superfluous by reading § 113(f)(1) to authorize a contribution action at any time, it would be even more so if § 107(a) were construed to authorize a contribution action at all, since it likewise contains no "during or following" limitation. As the Court explained in *Cooper Industries*, there is no reason why Congress would specify such a condition yet also allow a contribution action absent the condition. Moreover, for all the reasons explained supra at § III(B), § 113(f)(1) and (3)(B) would in their entirety be rendered superfluous, insignificant, or, in some instances, devoid of operative effect if § 107(a) were construed to confer an implied right of contribution under CERCLA or federal common law.

Accordingly, the court holds that a private PRP who seeks to recover from another PRP under CERCLA is limited to bringing a contribution action under § 113(f). Section 107(a) and federal common law do not confer this right.

* * *

The court grants Cooper's November 14, 2005 motion for partial summary judgment on federal claims and dismisses with prejudice Aviall's *CERCLA* § 107(a) cost recovery and § 107(a) and federal common law contribution claims—i.e., the first, second, and third claims of its third complaint. As in Aviall Services, 2000 WL 31730, at *5, having dismissed Aviall's federal question claims on the merits,[15] the court declines to exercise supplemental jurisdiction over its remaining state-law claims and dismisses them without prejudice.[16]

SO ORDERED.

August 8, 2006.

SIDNEY A. FITZWATER
UNITED STATES DISTRICT JUDGE

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[15] Although Aviall seeks relief under the federal Declaratory Judgment Act, it is not an independent source of jurisdiction. *See Aviall Services*, 2000 WL 31730, at *5.

[16] The court also dismisses without prejudice Cooper's counterclaims.